



Industry Research Report

A Conversation with Corporate Counsel: e-Discovery Trends and Perspectives

Conducted by



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Executive Summary

In-house corporate legal personnel responsible for managing litigation and governmental investigation are often asked questions about how they manage activities, particularly around electronic discovery. Their responses are tallied and added to a generic statistical analysis, but these professionals do not necessarily provide insight into the issues or the concerns they have on this very sensitive, business-critical process.

The purpose of this research was to engage the corporate counsel community in a conversation. It was designed to spark a dialogue and to illuminate issues related to legal holds, data management, vendor selection, e-discovery cost drivers, the amendments to the Federal Rules of Civil Procedure, litigation readiness, technology and more.

The findings and perspectives outlined in this report are the result of a series of one-on-one interviews focusing on concerns that are most important to the professionals that manage litigation throughout corporate America and the impact that e-discovery has on their work. It is meant to give those who responded an opportunity to share their knowledge, as well as offer those who did not participate the ability to benchmark their performance and plan for improvement.

High-Level Findings

- | 39% of respondents indicated that their general counsel has little to no involvement in the management of e-discovery.
- | 75% of respondents ranked their organizations at a 7 or higher (out of 10) in terms of how well their legal holds are enforced, documented, re-issued and monitored.
- | Legal cost drivers are fairly evenly divided between patent/IP (28.6%), products liability/class action (25%) and regulatory investigation/compliance (28.6%) matters.
- | 89% of respondents work in legal departments that have an e-discovery response team in place.
- | A majority of respondents (61 %) did not feel that their organizations were particularly impacted by the amendments to the Federal Rules of Civil Procedure (ranking the impact at 5 (out of 10) or below).
- | The relationship between legal and IT is improving dramatically. 79% of the respondents reported working “very close” with IT, and 61 % noted that legal is “often” consulted when IT adopts new technology.
- | 61% of companies have completed a litigation readiness assessment, most with the assistance of an outside source.
- | 43% of the respondents admitted that they did not know how much the company is spending in its entirety on e-discovery.
- | 46% of the respondents do not have a long-term agreement in place with a preferred e-discovery services provider.
- | Only 14% of the respondents engage national e-discovery counsel. The others use outside counsel for each specific case.

Research Background

Why was the survey/research conducted?

Electronic discovery is no longer a mystery in the legal community. The rules are well defined and the case law is mature. Every company in America has digital records, but the responsibility and maintenance for those records and their maintenance is shifting. The records are no longer managed by a single person or department. Rather, they are now managed by a company-wide team that is influenced by business interests across the entire spectrum. With the increased sophistication of this electronically stored information (ESI), there has been a transformation in how the discovery of ESI is viewed throughout an organization.

This survey was conducted not only to gather data on how e-discovery is being managed in corporate America, but to also find common points of success and frustration. The responses are meant to provide in-house legal teams with guidance to gauge their performance and offer suggestions for improvement based on the actions of their peers.

It is, in many ways, a best practices guide for the legal community established by the legal community.

Overview of who participated

117 professionals from Fortune 500 corporations were contacted to participate in this research, and 53 responded. Of those, 28 agreed to be interviewed by telephone for this study between March 25, 2008, and April 18, 2008, each conversation ranged in time from approximately 20 minutes to one hour. 26 of the respondents were lawyers who manage litigation in some respect, and two were non-lawyers with significant responsibility for e-discovery. 11 participants were female, and 17 were male. Occasionally, interviews were conducted simultaneously with two individuals at the same organization, but for purposes of this analysis, each company was counted once, and the responses were attributed to the senior individual on the call.

Of the organizations that were represented, 6 were in financial services, 3 in healthcare, 10 in manufacturing of various types, 3 in pharmaceutical and 6 in technology. There was a relatively even split between highly regulated and minimally regulated industries.

Most of the individuals had been in their positions for more than one year, but a number of those focused more fully on e-discovery were relatively new hires.

Emerging Issues & Trends

Common threads

More control of e-discovery is coming in-house, especially with increases in staffing as the most popular addition in 2008 (25% of the respondents reported that they will be adding at least one team member). In addition, 79% of the respondents reported adding some technology in the past 12 months to manage more of the e-discovery process internally.

Most of the surveyed lawyers who are responsible for litigation are spending less than 25% of their time managing the day-to-day e-discovery process, despite almost 57% of the respondents indicating that an associate general counsel or senior counsel-level individual is responsible for the day-to-day management of the e-discovery process.

The Struggles of Legal Hold

Despite the fact that a majority of respondents (75%) gave themselves a 7 or higher in terms of how well legal holds are enforced, documented, re-issued and monitored, many still had lingering concerns about perfection. Most revealed that the organization's process for identifying the appropriate custodians, advising them about their obligations and following up was working. The challenge of consistently maintaining the level of accuracy in a sea of litigation with countless matters always seemed to raise concerns, particularly around the difficulty in determining what ESI is subject to a hold notice and what is not.

It is likely that this difficulty prompted 9 of the 28 responding organizations (33%) to purchase or create litigation hold programs to for managing and automating the process in the past 12 months, as well as motivated four more (14%) to slate legal hold software for purchase this year.

In addition, while 100% of the respondents reported that the legal department manages the legal hold process, there is clearly IT input given the high percentage of those using software to manage their operations.

E-Mail Management

E-mail management is the biggest concern after legal hold oversight. In fact, 39% of the responding organizations have recently added e-mail archiving and related applications to address preservation and collection issues. Another is planning to do so in 2008.

Confidence in Readiness

Most organizations reported cooperative relationships between legal and IT, as well as using experienced paralegals and litigation support professionals as the foundation of a fairly well-developed discovery response process.

Surprising Trends

Legal/IT Collaboration

Despite the fact that almost 57% of the respondents advised that associate general counsel or senior counsel-level attorney managed the day-to-day e-discovery process, most of them indicated that the effort was much more of a collaboration between litigation support and IT.

Similarly, almost 89% reported that their organization has an e-discovery response team in place, and they are universally cross-functional and interdepartmental teams comprised of lawyers, paralegals, litigation support and IT. Some companies include records management and forensic document specialists as well.

Spam is Seen as Positive

In-house counsel actually read the newsletters sent by vendors and law firms. 75% of the respondents read publications related to e-discovery in one form or another. Many read magazines and newspapers, but also admitted to finding most of the information they receive from vendors and law firms of value.

Conferences are Not as Popular

Although 79% noted that they attend conferences, this is not a high priority. It is infrequent, and many attend to speak rather than to sit through the programs. That said, the Corporate E-Discovery Forum, Georgetown Advanced E-Discovery Institute and the Sedona Conference were the most popular events.

Cost is Not the Only Concern When Choosing a Vendor

While cost was raised most often, it was almost a given. Most people offered it as the obvious choice. Surprising was the passion with which individuals spoke about the responsiveness, experience and collaborative nature of their partners. They want skilled individuals that provide solutions to their problems. Period. They want honest relationships where the price quoted is the price paid (assuming no change in the project). It is not a cost issue; it's an integrity issue.

In-house counsel seem sensitive to the integrity of the partners with whom they work.

"Candor is a huge issue; someone who tells me their limitations makes me feel more comfortable than one who makes promises on which he or she cannot deliver," said one respondent. Another advised, "If a partner oversells and cannot deliver, we will never work with them again." The issue came up frequently enough to suggest that some may have already had a disappointing experience with a vendor. In connection with the integrity factor, one person hires partners that are "tool independent," so that they do not push one product over another due to an exclusive affiliate relationship. Another remarked, "You cannot work with someone who is not proven."

Knowledge of the company's business, reputation of professionals (cited as a key factor for court testimony) and recommendations from peers all factor into the calculation.

Cautions (reality may be different than perception)

While 61% of the respondents indicated that legal is 'often' consulted by IT when the organization adopts new technology, migrates to new platforms or changes storage types, many could not be certain about how often it actually occurred. "You don't know what you don't know," was a comment that different interview sources repeated.

State of the e-Discovery Industry – Detailed Analysis

Question by question findings & analysis

1. What concerns you the most when it comes to responding to litigation and/or e-discovery requests?

Cost is a major factor for 61% of the respondents, and the slowing economy came up in a few conversations. Compliance, collection and legal hold issues are also of concern. Other concerns include time constraints, finding ways to limit the scope of a request, abuse of discovery by an opponent, fear of sanctions, maintaining destruction schedules and an over reliance on technology. One attorney commented, “I am very concerned that technology has been overbilled and oversold.”

2. Where do you think your organization might be most vulnerable if a discovery request hit today?

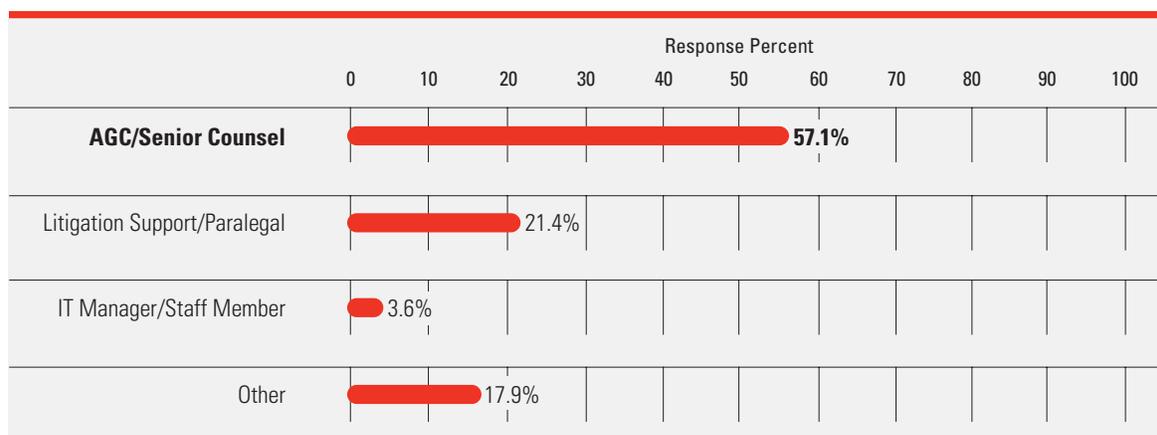
The single biggest conceived vulnerability for 21% of respondents is in decentralized e-mail and document management systems where the personal files of employees are not all stored on a common server. The legal hold process was another cause for concern for 11% of the respondents. There was a pervasive paranoia about missing a document and producing an incomplete set of responses.

Restoring legacy and back-up data, responding to an overly broad request, expense and data collections outside the U.S. were concerns as well.

3. Who manages the day-to-day e-discovery process for your organization?

The most common response was someone in the role of associate general counsel or senior counsel (57%), but 18% of the respondents noted that a combination of senior legal, litigation support and IT personnel manage the process. Accordingly, the senior legal staff is involved in the day-to-day e-discovery process about 75% of the time.

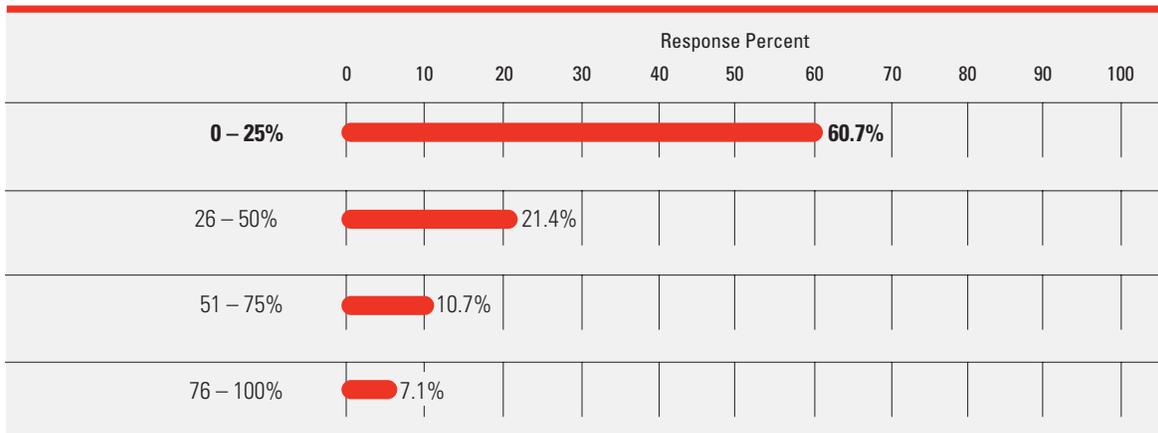
21% responded that litigation support or a paralegal manages e-discovery response, and 1 company (4%) uses an IT team member to oversee the process.



4. What % of your role is focused on e-Discovery?

Only 2 respondents indicated that they focus on e-discovery 100% of the time (7%). Most people actually spend a minimal amount of time on e-discovery issues, with 17 respondents (61%) indicating that they only focus 0-25% of their time on these concerns. Many cited numbers less than 25%.

6 more (21%) focus 26-50% of their time on such matters, and 3 (11%) are heavily involved at 51-75%. Overall, the vast majority (82%) of the respondents spend less than 50% of their time on e-discovery details.



5. On a scale of 1-10, with 10 being highly involved, how involved is your General Counsel in managing and overseeing e-discovery issues?

The most popular response to this question was 1(39.3%) for the very reason that the general counsel is an executive lawyer overseeing the legal strategy for the entire organization. He or she trusts the respondents to manage and oversee e-discovery.

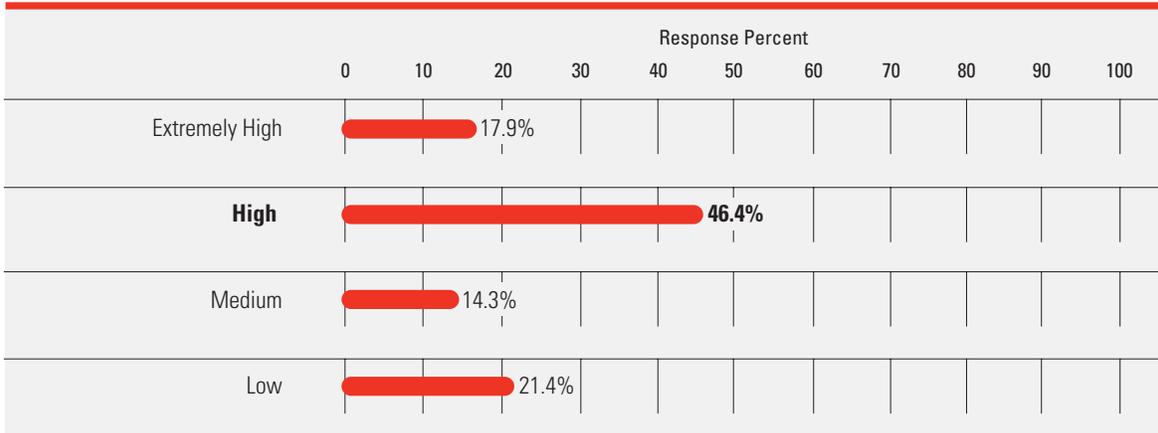
That said, in certain instances, there are unique issues of ongoing litigation or regulatory matters that required the general counsel’s oversight, which is why certain organizations responded with 4 through 8 according to their company’s circumstances.

For the most part, 79% of the respondents noted that their general counsel is involved at a level of 3 or below.

	Rating Sale											Rating Average
	(N/A)	1	2	3	4	5	6	7	8	9	10	
General Counsel Involvement	0.0%	39.3%	14.3%	25.0%	3.6%	3.6%	7.1%	3.6%	3.6%	0.0%	0.0%	2.71

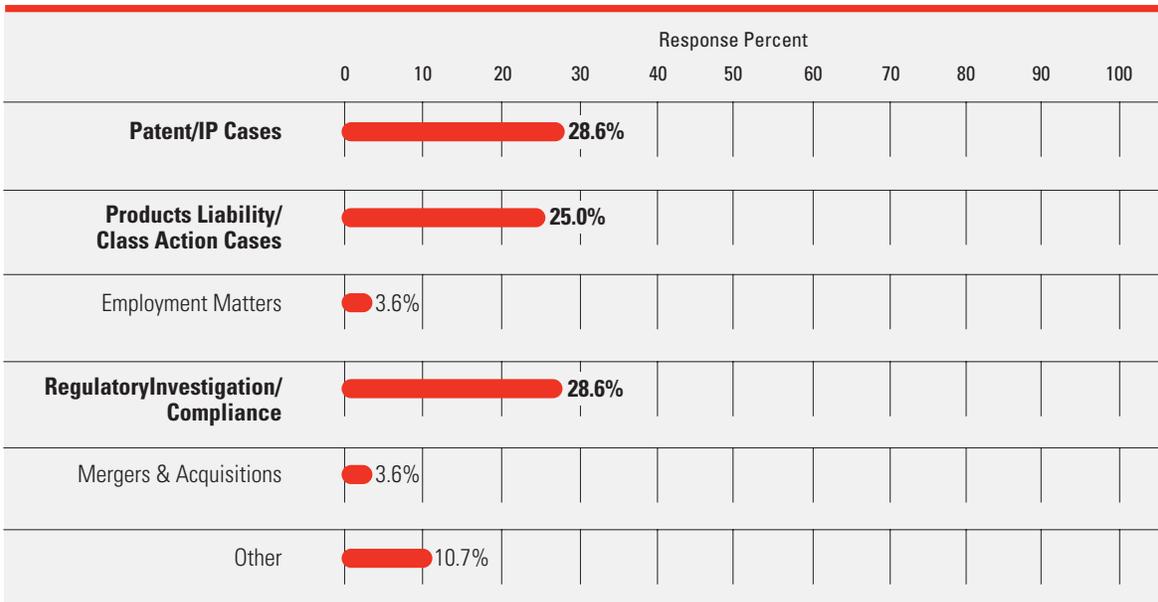
6. What’s your organization’s litigation and e-discovery intensity on a day-to-day basis?

As one would probably expect, most respondents (46%) rated their litigation intensity as “high,” with a few of those that are more highly regulated (18%) rating it as “extremely high.”



7. What’s your organization’s biggest legal cost driver? (Check all that apply)

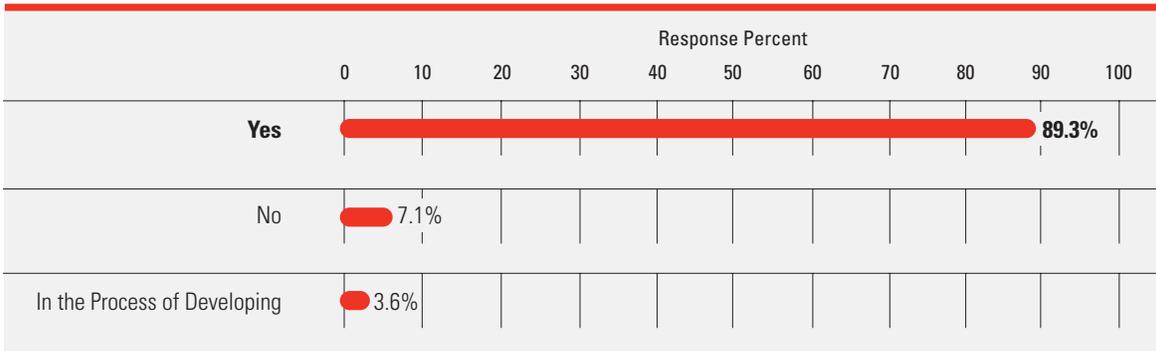
The responses to this question were fairly evenly distributed between those working in technology (patent/IP cases - 28.6%), manufacturing or pharmaceutical (products liability/class action matters - 25%), and financial and healthcare institutions (regulatory investigation/compliance - 28.6%). Others attributed their costs to general commercial matters or unique issues occurring at the moment (e.g., Subprime investigation, employment litigation and merger activity).



8. Does your organization have an e-discovery response team in place?

89% of those surveyed have an e-discovery response team in place, which is often made up of between 4 and 8 lawyers, paralegals, litigation support managers, records specialists and technologists.

Of the 3 that do not, 1 is in the process of developing a team, and 2 are in lower regulated industries.



9. On a scale of 1-10, with 10 being the most drastic, how drastically have the amendments to the Federal Rules of Civil Procedure changed how your organization responds to e-discovery requests?

Surprisingly, the respondents were almost evenly divided on this issue. 43% reported that their organizations were minimally impacted by the amendments to the rules and selected a rating below 10. 39% reported being more substantially impacted by the changes and selected a rating of 6 through 10. The majority of the responses (17.9% - 5/28) landed at 5.

The reason for the balanced distribution is that most companies reported some level of preparation prior to the date on which the amendments became effective. Although in certain cases, entire staffing positions were created in response. Many also reported a substantial increase in e-discovery processing, notwithstanding the fact that there has not been any increase in the number of cases filed.

One person even commented, "The amendments are a non-event." Another commented "We would have made all the changes without the rules." Still, one individual said "The rules have required companies to be more thoughtful and surgical up front in how lawyers think about e-discovery from day one."

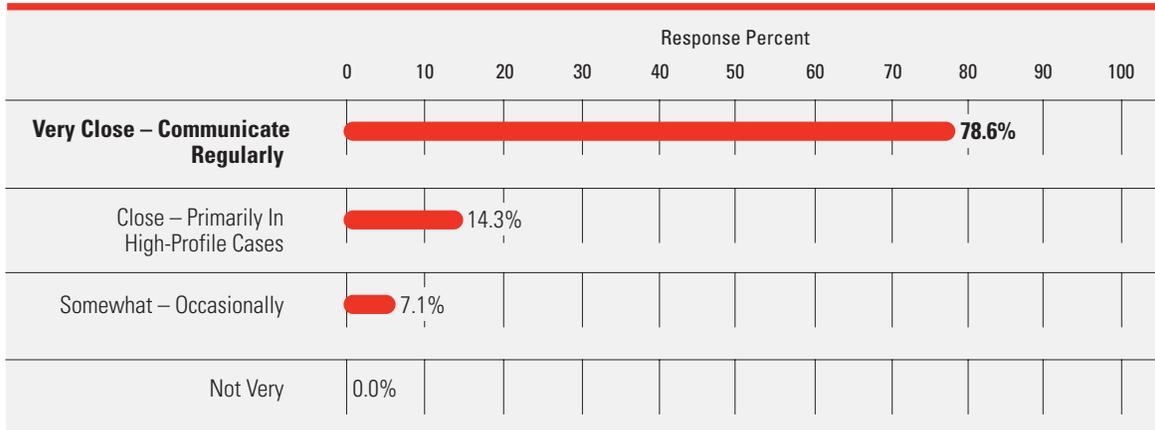
Overall, the theme was that the rules have brought a heightened awareness of e-discovery along with a new intensity from judges and plaintiffs. One even reported using the rule changes as an opportunity to focus the general counsel's attention on the issue. Another joked "It has inundated me with consultants who are selling me different things."

	Rating Scale											Rating Average
	(N/A)	1	2	3	4	5	6	7	8	9	10	
FRCP Rule Change Impact	0.0%	7.1%	10.7%	10.7%	14.3%	17.9%	7.1%	7.1%	14.3%	3.6%	7.1%	5.1

10. How closely does the legal department work with IT when preparing for and responding to e-discovery?

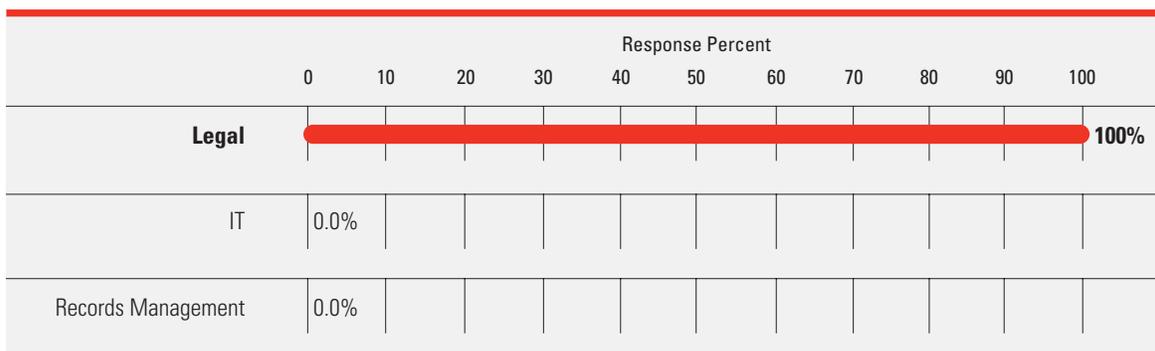
Legal departments overwhelmingly work very closely and communicate regularly with the organization’s IT managers (79%). 14% work closely, primarily in high-profile matters.

One commented “We work as one,” while another reported that the marriage between legal and IT is “the closest you can be.” Still another stated “We are virtually inseparable.” For the most part, the respondents described daily interaction and complete integration with IT.



11. Who manages the legal hold process within the organization?

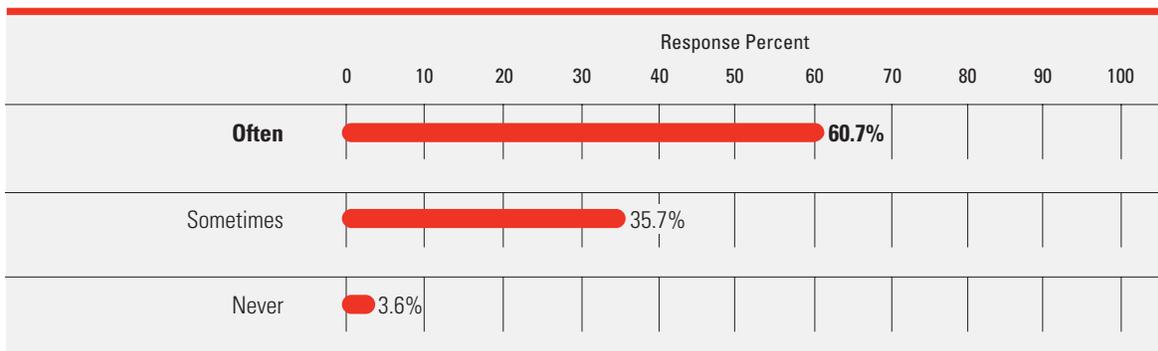
There was 100% agreement that the legal department administers the company’s hold process. Many organizations cited collaborative efforts with the IT and records management teams.



12. Is legal ever consulted by IT when the organization adopts new technology, migrates to new platforms or changes storage system types?

61% of the respondents noted that legal is often consulted by IT when the company adopts new technology of some type, but admitted that they could not be certain of how often it actually occurred. 36% admitted that IT “sometimes” consults but not frequently.

While one person commented that IT consults legal “absolutely every time,” and another reported “legal drives the adoption of new technology,” there were references to a recent time when the two departments did not communicate. In fact, one individual who responded “sometimes,” noted that “within the past year or two, the frequency has increased with respect to e-discovery.” Also, legal and IT tend to connect whenever there are contract negotiations for new technical products and services.



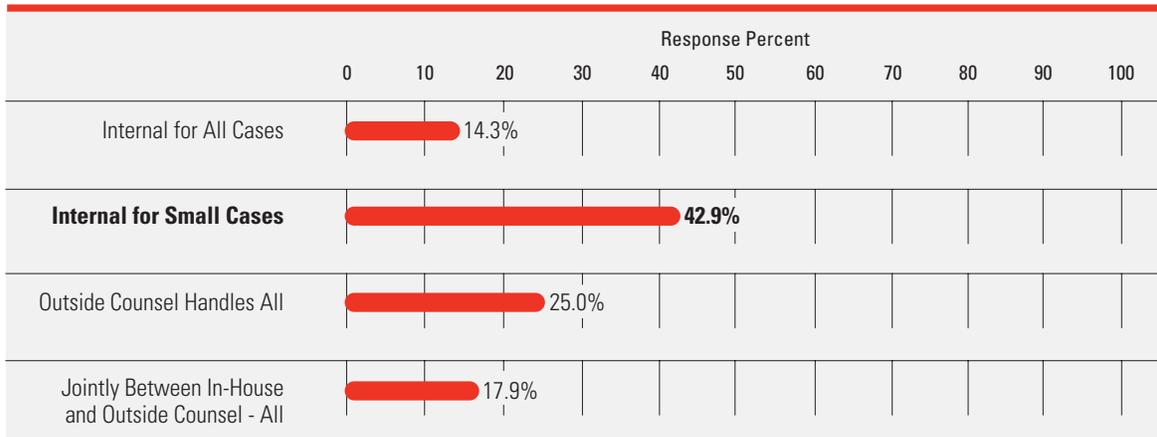
13. On a scale of 1-10, with 10 being the best, how well are legal holds enforced, documented, re-issued and monitored throughout the organization?

Most people gave their organizations high marks on this point. 8 was the most common rating by 28.6%; 64% of the respondents rated their performance at an 8 or above. This indicates a high level of confidence in the legal hold process.

	Rating Sale											Rating Average
	(N/A)	1	2	3	4	5	6	7	8	9	10	
Legal Hold Enforcement	7.1%	0.0%	0.0%	7.1%	0.0%	3.6%	7.1%	10.8%	28.6%	17.8%	17.8%	7.81

14. Is first-pass review and early case assessment something your corporate legal department is doing directly or do you rely on your outside counsel for this support?

Considering the ballooning costs of litigation, it is not surprising that half of the respondents reported handling first-pass review and early cases assessment in house, at least for all small cases. What was surprising was that 25% of those surveyed still allow outside counsel to handle all of these efforts. Some companies work in partnership with outside counsel so that neither has primary responsibility. Others manage the process by hiring the staff attorneys for outside counsel to supervise, or an outside vendor, to conduct first-pass review.



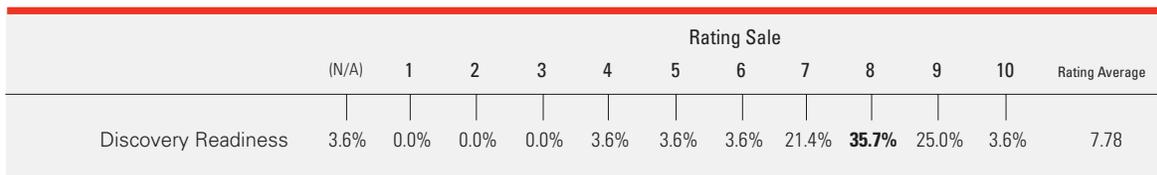
15. On a scale of 1-10 with 1 being "chaotic" and 10 being "buttoned up with continuous improvement built in," how would you characterize your company's readiness to respond to discovery?

Most respondents were fairly comfortable with their readiness to respond to discovery with 86% scoring their organization at a 7 or above. One even gave its team a 10.

Some wanted to give higher than their response, but admitted that "it is not a perfect science," while others noted that "there is always room for improvement." One respondent that scored the company with an almost perfect nine noted "Every time you think you have gotten everything, you find something that remains." Another ranking the company at 8 commented, "We are not perfect, but we are pretty good." 6 noted "a 10 is almost unachievable." One at 7 commented, "I don't think there is a 10 in existence right now."

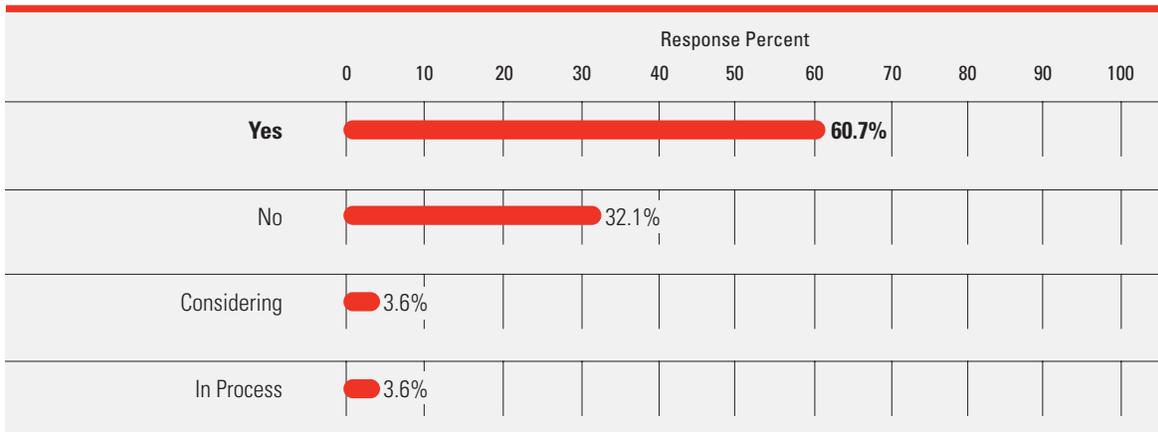
The most practical comment was from someone that rated the company as a 9, who highlighted "One of the benefits of being sued all the time is that you have to be ready to respond."

The individual who scored its team with a 4, noted that they are making an effort to reach a 7 or 8 by the fourth quarter of 2008.



16. Has your organization ever undergone a formal litigation readiness assessment to help identify gaps and opportunities for improvement in your e-discovery processes?

61% of the respondents reported that their organizations have completed a litigation readiness assessment. Most of them engaged an outside partner, either specialized e-discovery counsel or a vendor, to assist with this process.



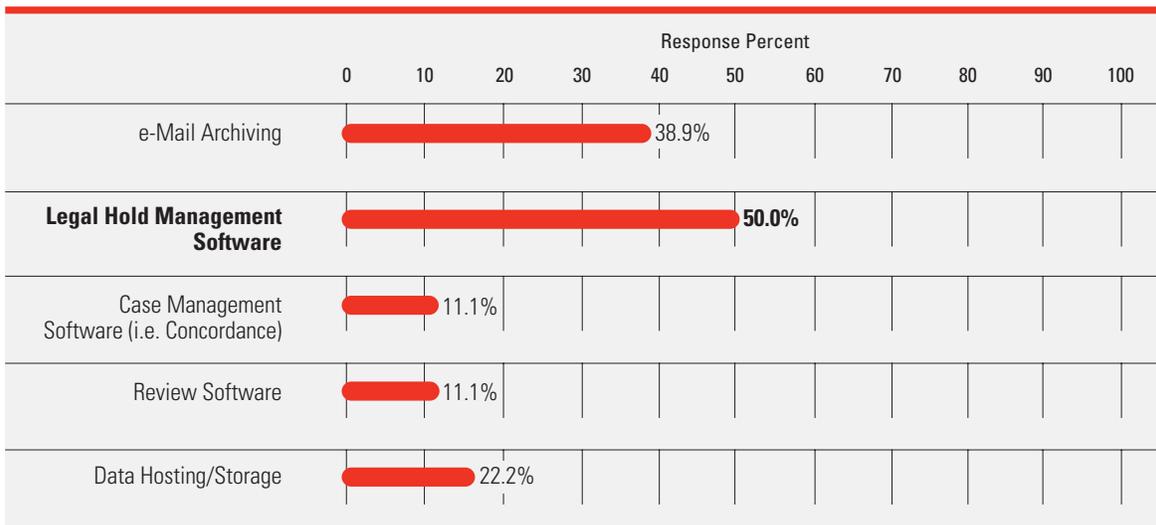
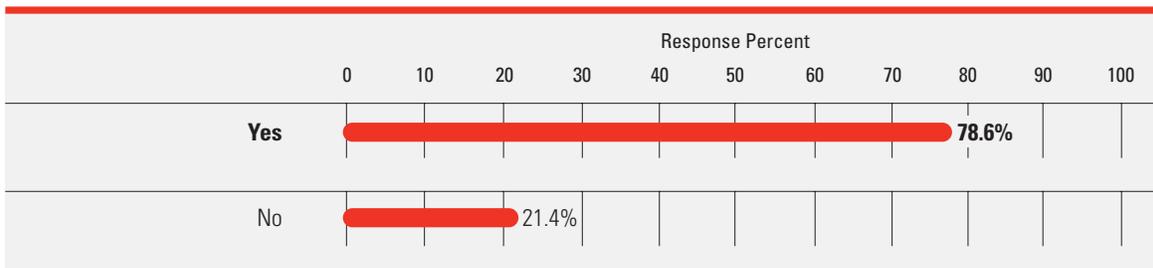
17. Do you currently have good line of sight into how much your company spends on a monthly, quarterly or on an annual basis on e-discovery, including the hard costs for collection, processing, review and production of electronic data and attorney review time?

Although 57% of respondents claimed to have a good line of sight into how much they spend on e-discovery, many recognized that there is some inherent uncertainty given the nature of the costs and their varied sources. Although 43% did not have that line of sight, they recognized the importance of basing cost decisions on the full picture, rather than a disparate collection of data.



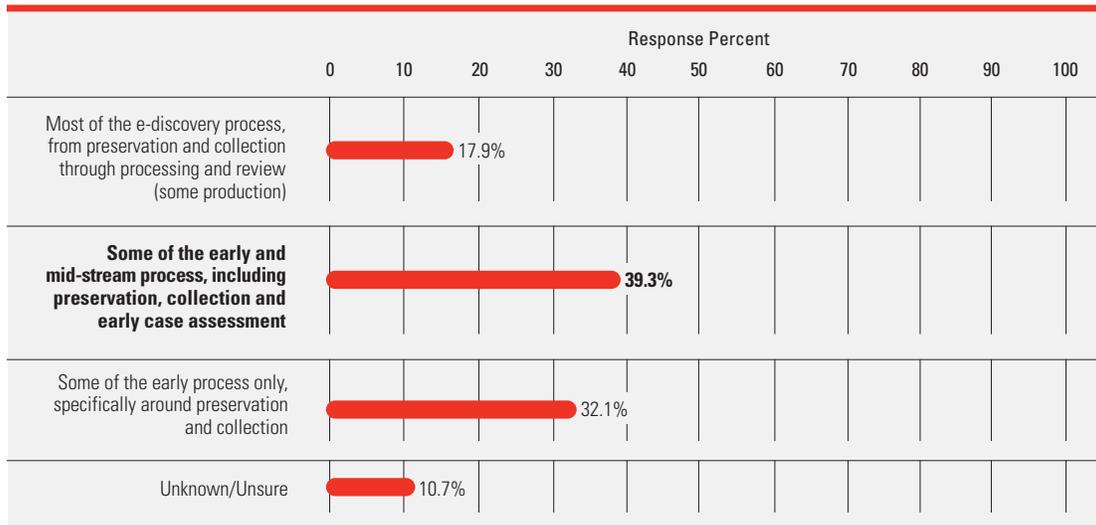
18. Has your organization invested in technologies specifically to address e-discovery issues in the past 12 months? If yes, what?

An overwhelming 79% of respondents reported investments in technology over the past 12 months. Of those that reported such investments, it was primarily in tools for e-mail archiving (39%) or legal hold management (50%). Others had also invested in case management software (11%), review programs (11%) and data hosting/storage (22%).



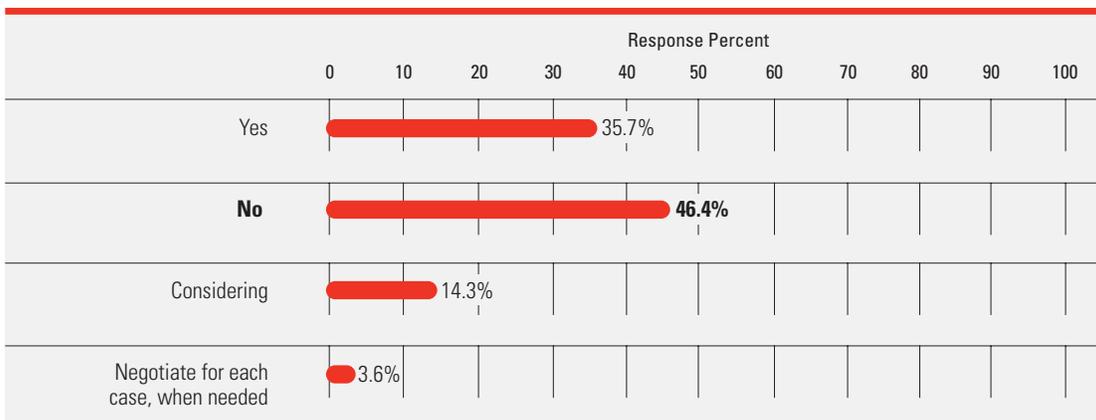
19. How much of the e-discovery process is your organization looking to in-source over the next 3-5 years?

Only a handful of those surveyed (18%) expect to in-source most of the e-discovery process, from preservation and collection through processing and review. Most of them (71%) will leave processing and review to outsiders, but a good number (39%) will try to manage the early and mid-stream work, including preservation, collection and early case assessment.



20. Do you have a long-term agreement in place with preferred e-discovery services provider or are you considering establishing such a relationship?

The respondents were divided on this point with 36% noting that they have an agreement and 46% reporting that they do not. Interestingly, despite having long term agreements in place, most of those who reported having such an agreement also said they are flexible and allow for engagement with other consultants when necessary. A few of those who did not report having preferred agreements indicated they have preferred contacts with whom they had worked.



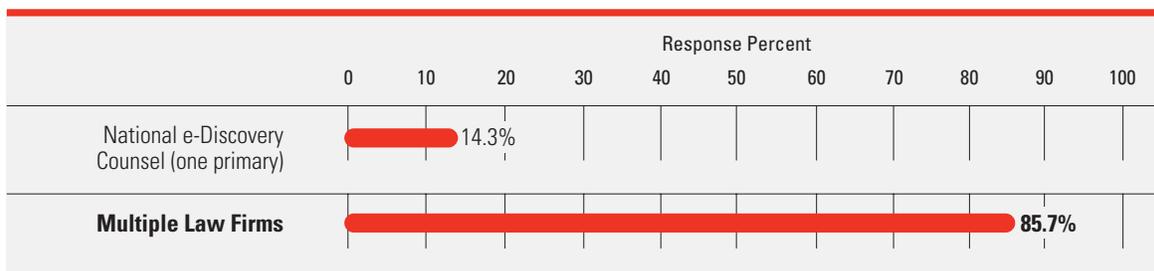
21. What are the main factors/criteria you consider when selecting companies to partner with in order to meet your litigation goals (specifically e-discovery)?

Although the most common response was cost, it was said so often that it is not really a factor. Competitive pricing is more of a prerequisite for consideration. When asked about the key criteria, one individual responded, “obviously cost,” and another highlighted that “cost is always a factor.” Despite the importance, quality of the work (25%), practical experience (11%) and responsiveness (14%) are important issues to more than a third of the respondents. “They must be extremely practical and demonstrate their value-add,” said one. “The speed with which the partner responds and addresses [an issue] is critical,” said another.

A few respondents mentioned familiarity with Lotus Notes as an important criterion, and others mentioned the necessity of a relationship with outside counsel.

22. Do you work with one primary e-discovery outside counsel or do you work with multiple law firms depending on the types of matters at issue?

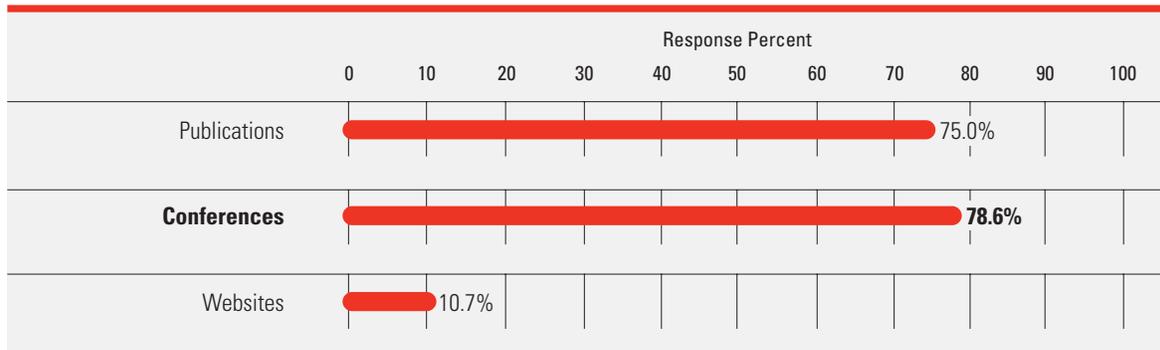
Only 4 of the companies surveyed work with a primary national e-discovery counsel. The vast majority (86%) use multiple law firms, depending upon the type of case, region and complexity.



23. What type of events do you attend, publications do you read or other educational resources for learning about e-discovery issues?

Most respondents read literature related to e-discovery, but none are particularly devoted to any one publication. They mentioned some popular titles but admitted to only reading specific magazines or newspapers on a periodic basis. They actually rely on law firm and vendor newsletters for the most recent updates and case law developments.

The same is true for conferences. While respondents repeated the same names and reported affiliation with one conference or another, none is an active and repeat attendee on a regular basis.



24. What do you see as the next major change or shift in legal practices inside the corporation over the next year or two?

In-house legal teams are constantly searching for more cost-effective ways of doing business, including streamlining the type of data that is preserved and processed. While the idea of taking ownership of the process was repeated throughout the interviews, one person noted “Nothing new, just re-sequencing the work and transformation of discovery about discovery,” alluding to the fact that discovery disputes have become the focus of many cases, rather than the substance of the case itself.

Another also remarked that there will be greater assessment of what a case is worth compared to the cost of discovery.

25. What process, technology investments or staffing changes do you already have planned in 2008? Are these specifically related to address e-discovery needs?

25% of the respondents will be adding at least one team member this year, while 32% are adding some type of technology enhancement. That is on top of the technology that 79% of the respondents reported adding in the past 12 months to address e-discovery.

Market Trends & Predictions

There are trends and then there is wishful thinking. Those surveyed believe that corporations will find efficiencies to control ballooning costs associated with e-discovery. It is the technique for achieving that efficiency that differs.

Internal control by corporate legal departments remains a continuing favorite for helping to solve the expense gap that is only widening as e-discovery becomes a more significant part of every matter. A number of respondents confirmed a continuation of the current trend toward greater ownership. That said, one respondent contradicted this point noting "The pendulum will swing the other way towards outsourcing to the most trusted vendors, as opposed to further in-house control." There is a school of thought that says that while in-house counsel may be more efficient than outside counsel, an independent third party might offer the best of both in terms of expertise, quality and speed.

After in-house management and control, the growth of concept searching and artificial intelligence was a popular prediction. Companies want to reduce the volume of material that human beings need to review. To help in that regard, there will likely be a trend toward saving less data. Companies will adhere to stricter destruction policies that do not run afoul of legal hold obligations.

As policies change, document management practices inside organizations will follow. One respondent commented, "The company needs to spend more time counseling IT and other business clients on the proliferation of electronic records at the creation stage." This effort will prompt organizations to standardize their retention policies with respect to e-mail and expand it to other forms of communication, such as instant and unified messaging. It will also include centralized control and storage of electronic documents, improved sorting and enhanced identification of electronic records.

The problem many companies are having with reducing their costs is that few are exactly sure how much they are actually spending. 43% of those surveyed admitted that they did not have a good line of sight into how much they are paying for e-discovery. Consequently, there will be a major push toward readily identifying costs, both in the aggregate and in narrowly tailored segments for quick evaluation purposes. Outside counsel will need to bill their time more specifically and according to a uniform code system, which will enable in-house teams to make these calculations.

As they will with their law firm, companies will fight back against adversaries and even judges, when appropriate. One respondent summarized the trend this way, "Corporations will become more thoughtful, intelligent and savvy." That individual also highlighted that companies will become bolder in defending their positions on discovery noting, "They will push back on the judiciary as well as plaintiff's counsel."

It is not clear whether off-shoring is high on the list, but it does intrigue many. In the near future, expect to see an increase in those who test the concept of off-shore review with smaller projects to gauge its utility.

Finally, education around the issues related to litigation hold will become more important. Vendors will provide classes, and law firms will offer clients and prospects seminars on this topic. Similarly, there will be an increase in overall technology training as it becomes more ubiquitous in the legal department.

About Ari Kaplan, Esq.

Ari Kaplan is a lawyer and a writer based in New York. He has been focusing on legal technology, including compliance, foreign language e-discovery, extranets, digital redaction, enterprise search and contact management, among other topics, for many years.

As the principal of Ari Kaplan Advisors, Mr. Kaplan counsels professionals internationally on the art of getting published and dynamic networking. He teaches techniques for leveraging writing and embracing other activities as the foundation for business development. His in-house training programs, personal coaching and corporate writing projects communicate his methods.

The author subscribes to his training philosophy. He has published over 150 articles, served as a legal commentator for CNET Radio, hosted a public access cable television show in Manhattan, taught Internet law at Baruch College, and founded the Ari Kaplan Advisors charitable book collection through the Intergenerational Literacy Project in Chelsea, Mass.

Mr. Kaplan is a member of the Board of Editors for ALM Media's *Marketing the Law Firm* and *Legal Tech*. He has been interviewed on CNN and was named a "Law Star" by LawCrossing. He is also the recipient of a 2007 Apex Award recognizing his marketing article for *Small Firm Business* magazine, "How To Stand Out From a Crowd."

Mr. Kaplan practiced law in New York City for nearly nine years and is admitted to the bar in New York, New Jersey and Washington, D.C. He earned his J.D. from George Washington University Law School and his B.A., magna cum laude, from Boston University.

Thomson-West will be releasing his new book, *The Opportunity Maker: Strategies for Inspiring Your Legal Career Through Creative Networking and Business Development*, in June.

For more information about Ari Kaplan Advisors and its services, visit www.AriKaplanAdvisors.com.

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